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Supreme Court of the United States

OCTOBER TERM, 1941

No. 164

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, a Corporation, Petitioners,

vs.

RICHARD F. WILD, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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While the brief of the respondent was not filed within the time required by the Rules of the Court and the petitioners waived any objections they would have had, they feel that there are some statements, concessions and contention in respondent's brief, which may very properly be called to the attention of the Court by this reply, which we trust the Court will consider.

The respondent does not make any point that the petition for the writ was not filed in time, for it was so filed, or that the decision of the Supreme Court of Missouri did not become the final decision of the highest court of the state upon the overruling of the petitioner's motion to transfer the cause to the Court en Banc. Therefore the Rules of the Missouri Supreme Court and the provisions of the Missouri Constitution relating to motions for rehearing and to transfer of causes from a division of that Court to the Court en Banc, set out in the appendix to petitioners' petition and brief (pages 50, 51) are not important in so far as any objections of the respondent to the granting of the petition are involved.

Before taking up in order the points in respondent's brief in opposition to the reasons for the writ as stated in the petition, we wish to call attention to a statement in respondent's brief, which seems to be a definite concession that there is a good and sufficient reason why the Court should grant the petition and review the judgment of the state court in this case. That concession is the statement on page 15 in the second sentence in the second paragraph, where, after referring to the point made by petitioners in paragraph two of the Reasons Relied on for Allowance of the Writ (Petition, page 11), ~~that~~ and in the argument in their brief (pages 26 to 33) that the evidence did not show and the jury was not required to find that the hand brake was defective, the respondent says, "We frankly concede our inability to find any decision of this Court which passes directly upon this aspect of the provisions of the act, and of the order of the Commission relating to 'efficient hand brakes,' * * *." This point will be discussed later in this reply where we endeavor to show the reasons why the cases relied upon

by respondent construing and applying the earlier Safety Appliance Acts, like the act requiring that cars be equipped with couplers coupling automatically by impact, the very purpose of which is to eliminate human energy and effort in the operation of the appliance, are not applicable and should not be followed in this case, arising under the later statute relating to hand brakes, which the evidence of the respondent in this case shows cannot be operated in any other way than by the exercise of the human energy and effort of the operator (the respondent in this case), which human energy and effort must be exerted and applied with care, caution and exactness in order to be effective and to avoid injury to the employee.

I.

The first reason for the writ as stated in the petition and the point which respondent discusses in Point I of his reply is that the respondent only pleaded, and the judgment is based solely upon, facts not made unlawful by the Safety Appliance Act, that is that the petitioners (defendants) failed to have the L. & N. Railway Company's car equipped with an "efficient hand brake."

However earnestly and often counsel for respondent may endeavor to explain, evade or deny the cause of action alleged in his petition, the fact remains that the cause of action alleged—and the **only** cause of action alleged—is that respondent's injuries **"directly and proximately resulted from defendants' failure to perform their duty** under the Statutes of the United States of America (commonly known as the Federal Safety Appliance Act), **and the orders, rules and regulations of the Interstate** Commerce Commission of the United States made and

promulgated pursuant thereto, in such cases made and provided, **to have said box car equipped with an efficient hand brake"** (R. 3).

The respondent is surely bound by the definite and plain allegation of his petition. He may not change that allegation now by claiming that he meant something which he did not allege, or that what he alleged means something different from what it plainly charges. It is not necessary to argue against the respondent's contention that the statute makes it unlawful for a carrier to haul or use a car not equipped as the statute requires. That may be conceded. The trouble, however, with respondent's case and contention is that he did not base his right to recover on a charge that the petitioners did the affirmative act made unlawful by the statute, that is, that they used a car, which did not have an efficient hand brake, but charged the petitioners with a negative omission, a failure to do something that the statute did not require them to do, that is to have another carrier's car equipped as the statute and the order of the Interstate Commerce Commission required. The statement in plaintiff's petition, quoted in respondent's brief, that while he was working on cars being used on defendants' lines and in defendants' Luther Avenue yards he was on a car and when he was on the car and attempted to use the hand brake on the car it reversed and threw him from the car, does not change the direct and positive allegation that his injuries "directly and proximately resulted from defendants' failure to perform their duty * * * to have said box car equipped with an efficient hand brake."

If there were any room for doubt as to what this charge

in the plaintiff's petition means, and we do not believe there can be, it would be removed and overcome by the allegation in the paragraph of plaintiff's petition immediately following the part quoted, which is as follows:

"Plaintiff further states that, **as a direct and proximate result of defendants' aforesaid failure** to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission," plaintiff received the injuries described.

The Safety Appliance Act does not make it the duty of one carrier to equip another carrier's car with **secure** hand holds or with **efficient** hand brakes, but the respondent in this case alleged and recovered on the ground that the petitioners failed to do what the act did not require them to do. If there was any liability for a failure to have the L. & N. car equipped with a proper hand brake, the liability and the right to recover were against the owner of that car. If respondent was injured as the "direct and proximate result" of failure to "have said box car equipped with an efficient hand brake," as he twice alleges, his right to recover was against the owner. While the respondent twice alleges that he was injured as the "direct and proximate result" of failure to have the car equipped, he does not once allege that he was injured as the result of the defendants using or hauling a car not properly equipped, which is the thing the act makes unlawful. This is clearly shown by section 3 of the Act of April 14, 1910, section 13, Title 45, U. S. Code, which is set out in full on page 48 of petitioners' petition and brief, and only partly quoted in respondent's brief at pages 11 and 12. The first part of the section shows that

penalty provided is for **using** or **hauling**, or permitting to be used or hauled, and nothing else. The portion of the section quoted at the top of page 12 of respondent's brief provides that "nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee **by reason of or in connection with the movement or hauling** of such a car which is **defective or insecure** or which is not maintained in accordance with the requirements of this chapter * * *." (Emphasis ours.) This shows very definitely it would seem that the only liability for injury or death of an employee is **"by reason of or in connection with the movement or hauling of such a car which is defective or insecure."** As might be expected, the respondent did not supply any emphasis to the parts here emphasized. We shall refer later to the part of this section of the act, which so clearly shows that the liability to an injured employee is only in connection with or by reason of "the movement or hauling of a car which is **defective or insecure,**" and that the carrier is not liable and an employee is not entitled to recover when he is injured while using a hand brake unless he alleges in his pettition, proves by the evidence and requires the jury to find that the car was "defective or insecure." All of which the state court held was unnecessary in this case.

The two cases respondent cites on page 12 of his brief, the Layton Case (243 U. S. 617) and the Taylor Case (210 U. S. 281), shows that this Court has held that liability under the Safety Appliance Acts involved in those cases, both for the penalty and for the injury to an employee, results from the use of a car not properly equipped, and not from a failure to equip the car of another rail-

road. We are unable to see how respondent finds any support in these cases. It will be remembered that neither of these cases involved the use of a hand brake, and that respondent's counsel say in their brief that they have been unable to find a decision of this Court involving such use.

In Louisville & N. R. Co. v. Layton, 243 U. S. 617, the Court at page 618 said:

> "The recovery in the case was on the first count of the petition, which alleges that the defendants were * * * **negligent** among other things in permitting the **use** of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped with automatic couplers, which would couple by impact, as required by law, * * *."

On page 621, the Court, interpreting and applying the statute as written, says:

> "* * * The language of the Acts (the Safety Appliance Acts) and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to **use** cars not equipped as required * * *." (Emphasis ours.)

It probably is not necessary to cite cases to support the proposition that the Court will consider and determine the nature of the pleading and the nature of the cause of action alleged from the language of the pleading and not from what counsel now say they intended to allege or from their interpretation of the plain language they used. We call attention, however, to one recent decision of this Court on this point.

In American Propeller & Manufacturing Co. v. United States, 300 U. S. 475, the Court, at page 478, quoted from its opinion in another case and said that the principle there stated "suggests that the Court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

The Court, at page 479, rejected the contention of the United States that the finding of the Court below should be sustained based upon a presumption of official regularity, and said:

> "But we are dealing here not with a presumption, but with a specific finding; and that finding should be examined in the light of the pleadings."

It seems clear that the state court in holding that the respondent was entitled to recover under the Safety Appliance Act of April 14, 1910, for failure of the petitioners to equip the car of another carrier with an efficient hand brake, when the Act only creates liability against a carrier for injuries or death of an employee "by reason of or in connection with the movement or hauling of such car," has decided a Federal question of substance not heretofore determined by this Court, and has decided the question in a way probably not in accord with applicable decisions of this Court, requiring that the nature of the cause of action upon which a plaintiff seeks to recover, must be determined from the pleading filed by the plaintiff. Under the Rules of this Court, the review of that decision would seem to be the exercise of sound judicial discretion.

II.

The respondent disregards the definite distinction that exists between the provisions of the Acts of Congress relating to hand brakes and other safety appliance, particularly automatic couplers, and between the manner of operation of these different appliances.

The provisions of the act relating to equipping cars with hand brakes, enacted April 14, 1910, and the automatic coupler and air brake act of March 2, 1893, amended March 2, 1903, are entirely different. The manner of operation of automatic couplers is entirely different from the manner of operating hand brakes and in both respects, and for both reasons the decisions of the courts under the automatic coupler law are not applicable in cases arising under the hand brake law.

While some state and federal courts have held that evidence of failure of a hand brake appliance to function properly when used in normal and proper manner, was sufficient to justify a jury in finding from that evidence that the appliance was defective, no appellate decision has been cited, and we believe none can be found, certainly no decision of this court can be found, which holds that a verdict of a jury should be approved when the jury was not required by the instructions of the court, to find from the evidence that the appliance was defective.

The respondent on page 15 of his brief in opposition to the petition, after referring to the word "efficient" as contained in the Act of April 14, 1910, and the order of the Interstate Commerce Commission made pursuant to that Act, says:

"We frankly concede our inability to find any de-

> cision of this Court which passes directly upon this aspect of the provisions of the Act and of the order of the Commission relating to 'efficient hand brakes'."

The respondent then argues that the decisions of the lower federal courts and the state courts should be followed by this court presumably, and apparently, because this court in eight cases cited by the respondent denied certiorari to review the decisions of those courts.

Counsel for respondent in their brief cite eight different cases in which they say this court denied certoirari. They call attention nineteen times to the action of the Court denying certiorari and they state five times that certiorari was denied in Spotts v. Baltimore & Ohio R. Co., 7 Cir., 102 F. (2d) 160, which is the case upon which they seem to rely most hopefully.

They seem to have entirely overlooked the ruling announced by this court, both upon the oral argument of cases and in its opinions, that the denial of a petition for writ of certiorari means only that the writ was denied.

This court in United States v. Carver, 260 U. S. 482, a libel in personam against the United States and the receiver of a corporation, at page 490, says:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

In Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, the action was under the Federal Employers' Liability Act

for the death of a switchman who was killed when he came into contact with a semaphore placed at a greater distance from the track than the order of the South Carolina Railroad Commission prescribed.

The Court in the opinion by Mr. Justice Holmes at page 403 said:

> "* * * No negligence is proved against the petitioner. It is urged that a certiorari was denied in Central of Georgia Ry. Co. v. Davis, 7 F. (2d) 269, which seemed to qualify the doctrine in the Berkshire case (254 U. S. 415). But 'the denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, as the bar has been told many times.' United States v. Carver, 260 U. S. 482, 490."

The judgment of the Supreme Court of South Carolina was reversed.

These decisions of the Court would seem to fully justify the conclusion that the denial of certiorari in the numerous cases cited and relied upon by respondent, and particularly the denial in the Spotts case (102 F. [2d] 160), will not be held to support the decision of the state court in this case and we believe the Court will not be influenced in the consideration of the petition for the writ in this case by the numerous citations of denial in other cases.

In South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, the Court reviewed the decision of the Court of Appeals and at page 253 said: "Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit in the case of Maryland Casualty Co. v.

Lawson, 93 F. (2d) 190, we granted certiorari." The question in that case was whether the deceased was a member of the crew of the vessel on which he was performing services within the meaning and scope of the Longshoremen's and Harbor Workers' Compensation Act.

The Court at page 258 says:

> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude.
>
> "The word 'crew' does not have an absolutely unvarying legal significance."

The Court then cited a case which stated varying uses of the term and at page 259 says, "It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration."

The Court held that the term "crew" in that case did not apply to the deceased.

So in this case, it seems that the petitioners are fully justified in asking the Court to review the decision of the state court to consider and determine whether the use of the term "efficient hand brake" as used in section 2 of this Safety Appliance Act, means that the carrier is an insurer at all hazards and regardless of whether the appliance is defective, or if that term is to be interpreted and applied in connection with and in the light of the use of the terms "defective and insecure" and "defective" and "out of re-

pair" as used five times in sections 4 and 5 of the same Safety Appliance Act in defining the conditions and circumstances under which a carrier may be or may not be liable for using a car, having a defective hand brake. It will be noted that in every instance where the carrier is to be held liable either for the penalty or for injury to an employee, it is only for the movement of a car that is defective. The state court wholly overlooked this.

The title of the Act of April 14, 1910, shows that the Act was not intended as insurance against injury. The title is "An Act to *supplement* 'An Act to *promote* the safety of employees and travelers upon railroads,'" etc. To "promote" does not mean to "insure." It means to help to contribute to the prosperity of employees and travelers upon railroads.

It is clear that Congress intended to and did make a distinction in this Act between sill steps and hand holds or grab irons, and hand brakes, for in section 2 of the Act it said that "all cars must be equipped with *secure* sill steps and *efficient* hand brakes; all cars requiring *secure* ladder and *secure* running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with *secure* hand holds or grab irons." The term "secure" means safe, free from danger, incapable of doing harm and is applied to appliances and equipment which are fixed, permanent parts of a car and are not operated or put into action or use by any human action or agency, whereas the only way the hand brake can be used or made useful or effective or efficient is by human action, agency and energy. The distinction and difference are still greater when the requirements of the statutes and manner of use of automatic couplers and hand brakes are considered.

In United States v. American Trucking Association, 310 U. S. 534, the Court stated principles which seem applicable to the questions involved in this case now presented to the Court. In that case, at page 541, the Court said:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation."

The respondent cites several decisions of this Court in cases which arose under the Act of March 2, 1893, requiring that cars be equipped with automatic couplers and efficient handholds. Respondent argues that the ruling of this Court in automatic coupler cases ought to be applied in this case. This Court has answered that argument by its ruling in Wright v. United States, 302 U. S. 583, in answering the similar argument with respect to the decision of the Court in the Pocket Veto case. The Court, at page 593, said:

> "In interpreting the word 'adjournment', and in referring to other provisions of the Constitution using the word 'adjourn', the Court was still addressing itself to a case where there had been an adjournment by the Congress. The Court did not decide, and there was no occasion for ruling, that the clause applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress. Any observations which

could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft-repeated admonition of Chief Justice Marshall 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used', and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision', has special force in this instance. Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290."

The ruling of the Court in the case just cited seems to fully justify the petitioners here in asking the Court in passing upon the petition for the writ to disregard the decisions of the Court in the cases arising under the automatic coupler law as well as the rulings and orders of the Court in denying certiorari in the numerous cases cited by respondent.

While the respondent expresses dissatisfaction with the statement of facts made by the petitioners there are certain portions of the respondent's statement which we accept as correct, for they state the facts as petitioners have stated them. Respondent says on page 3 of his brief in opposition to the petition, that the type of brake on this car, L. & N. 12670, "is clearly illustrated by the photographs offered in evidence as defendents' Exhibits 10 (R. 125), 11 (R. 126), and 12 (R. 164)."

He also says on page 3 of his brief that the brake apparatus was equipped "with a ratchet wheel and pawl arrangement attached on the upper side of the brake platform." In describing his actions at the time of injury he says that after he climbed to the brake platform,

"He then placed his left foot against the **outer edge of the pawl** or 'dog' to engage it with the teeth of the ratchet wheel (R. 26, 86) and turned the wheel in a clockwise direction to tighten the brake (R. 26, 87). He continued to so turn the brake wheel until he had tension on the brake (R. 26, 29, 86, 87), and, as he did so, he kept his left foot against the pawl * * *." (Respondent's Brief, p. 3.)

The statement continues on page 4 of the brief as follows:

> "After respondent had tension on the brake, and while he still had his foot against the pawl and without any change, slipping or other movement of his body (R. 30, 32, 108) the pawl or 'dog' failed to hold the brake in position and to keep it from reversing (R. 108 * * *."

On page 5 respondent says that the inspection tests made the night and morning after the injury "failed to disclose any physical defect in the brake."

The photograph of the car L. & N. 12670 taken the morning after the injury (Defendants' Exhibit 10, facing R. 125) shows the brake staff marked 1, the ratchet wheel marked 3, which respondent testified was fastened to the brake staff, the dog or pawl marked 2, which respondent testified was fastened onto the iron plate on which the ratchet wheel marked 3 rested, and the safety guard marked 4 which is a part of the casting to which the dog or pawl was fastened and on which the ratchet wheel rested, this guard extending about an inch over the prongs of the ratchet wheel (R. 125, 126, 127). A brake platform with the iron plate or casting, the ratchet

wheel, the dog or pawl and the safety guard extending over the edge of the ratchet wheel, which was like the brake platform and appliances shown in the photograph of the car in question (Defendants' Exhibit 10), was described by the witnesses (R. 126, 127, 142, 143) and respondent in his brief, page 3. The safety guard over the ratchet wheel prevents the ratchet wheel from coming up and is one of the Government requirements (R. 143).

The undisputed physical facts show that the brake wheel could not have reversed because "either the ratchet came above the dog or the dog came above or below the ratchet," as respondent said in his statement made on March 3, 1938 (R. 102), and in his explanation of this statement made in his testimony at the trial on redirect examination (R. 106, 108) after the statement had been read in evidence (R. 102). He said in his statement (R. 105), "I don't know if any part of the brake was faulty or broken as a fact, but I know that it did not hold."

The respondent testified that "the brake staff extended through the ratchet wheel," that "the ratchet is fastened onto the brake staff" (R. 86, 108), that the dog or pawl "was a curved piece of iron or steel that had a hole through about the center of the length of it that fastened the dog onto this iron plate that the ratchet wheel rested on" (R. 86). He testified that each time he turned the brake wheel he heard the dog click in the ratchet wheel (R. 27, 87).

Each time the brake wheel was turned from left to right to tighten the brake, the point of the dog or pawl which meshed in the notches between the prongs of the ratchet wheel when pressure was applied to the dog or

pawl so as to hold the point against the revolving prongs of the ratchet wheel, had to clear the end of the prongs of the ratchet and as the brake wheel was turned from left to right, or clockwise, the point of the dog or pawl would have to be moved from the notch between the prongs so as to clear the end of the next prong of the ratchet before the pawl could go into mesh with the next notch of the ratchet wheel and at that time as the point of the pawl was passing over the point of the prong of the ratchet wheel the pawl is temporarily disengaged and could not hold the ratchet wheel or prevent the brake wheel from reversing. The plaintiff testified to this (R. 29) and so did a car inspector (R. 154), and unless the man using the brake kept his foot firmly pressed continuously against the dog or pawl and at the right place on the pawl so that the end of the pawl would move into the notch between the prongs of the rathchet wheel the instant the end of the pawl passed over the end of the prong, the brake wheel would reverse rapidly when the operator released or started to release his hold on the brake wheel after having turned it from left to right and when in the act of changing the position of his hands on the brake wheel in order to give it another turn from left to right. This is evidently what happened for the respondent said in his statement (R. 104), "and when I let loose of the wheel or started to let loose the wheel spun around and I could not let loose and it threw me to the left or east."

If the respondent had his left foot against the outer edge of the dog or pawl, as is stated in his brief, in order to press the point of the pawl against the ratchet wheel and cause it to mesh in the notches of the ratchet wheel as he turned the brake wheel he had to have his foot

pressing continuously against the forward portion of the curved or S shaped pawl, that is the portion nearest the car and between the bolt at the center, which fastened it to the iron trunnion or plate on which it rested, and the end of the pawl which meshed in the notches of the ratchet wheel, as he applied his strength in turning the brake wheel from left to right to tighten the brake and check the movement of the car. Wherever he placed his left foot against the dog or pawl, as he stood on the wet, sleety brake platform wearing rubbers on account of the weather, he had to keep his rubber clad foot pressed firmly against the dog or pawl at a point on the pawl so that the end of it would be firmly and continuously pressed against the prongs of the ratchet wheel as it turned, and if he released the pressure or shifted the position of his left foot even in a slight degree, the end of the dog would not be forced into the next notch of the ratchet wheel after being disengaged in passing over the adjoining prong of the ratchet wheel, and there would be nothing to hold the brake and the brake wheel when he released or started to release his hold on the brake wheel to get a new hold and the brake wheel would invitably reverse, as respondent testified (R. 29); if it did reverse as respondent says.

We are, of course, considering this testimony offered by the plaintiff, and not the positive testimony of the switch foreman (R. 269, 273) that the brake was securely set and the pawl was holding the ratchel wheel when plaintiff fell from the car.

The case of Spotts v. Baltimore & Ohio, 102 F. (2d) 160, on which the respondent seems to rely, was quite different from the case at bar. In that case the Court says that the

complaint charged that "defendant *negligently* failed to equip properly a certain car with an efficient brake wheel and brake staff, contrary to the provisions of the Safety Appliance Act, *negligently* provided a brake staff and wheel which fell to one side, when plaintiff attempted same, and *permitted the brake to be and remain in a defective and unsafe condition* contrary to the provisions of the Safety Appliance Act." (Emphasis ours.)

In this case plaintiff contended, and the state court ruled, that plaintiff was not required to allege or prove that defendants were negligent or that the brake was defective.

In that case, the plaintiff did not allege a right to recover under the Federal Employers' Liability Act. In this case the plaintiff expressly based his right to recover under the provisions of the Federal Employers' Liability Act. (R. 3.)

The petitioners believe that the differences that exist between the provisions of the Act of April 14, 1910, in relation to hand brakes, and the provisions of prior Safety Appliance Acts relating to automatic couplers and other appliances not requiring the exercise of human effort, the difference between the operation of automatic couplers, which are required in order that men will not have to go between the ends of cars and exert any human effort in coupling cars, while the use of hand brakes necessarily requires the careful and constant exercise of human effort in their operation, and the fact this court has never ruled on these questions which relate directly to railroad operation over the entire country, fully justify the consideration of this court to determine whether an employee can recover for injuries while using a hand brake without alleging or proving or requiring the jury to find that the hand brake was defective or out of repair.

III.

The plaintiff (respondent) alleged he was injured because of the failure of the defendants (petitioners) to have the car equipped with hand brake in accordance with the orders and regulations of the Interstate Commerce Commission. Section 3 of the Act of April 14, 1910 (Sec. 12, Title 45, U. S. Code), expressly provides that the standards fixed by the Interstate Commerce Commission shall be the standards of equipment required by the Act, and compliance with those orders and regulations and the equipping of a car with a hand brake which conforms to the standards fixed by the Commission, is all that is required by the Act. The respondent wholly failed to prove and the jury was not required to find from the evidence that the hand brake respondent was operating or attempting to operate did not comply with the orders and regulations of the Commission. This was an essential part of respondent's pleading and an essential fact to be proved by the respondent and found by the jury, but it was entirely ignored by the state court. It is a federal question of substance not heretofore determined by this court, and for this reason it should, it would seem, be reviewed by this court.

The respondent does not cite any decision of this court on this question and presents no valid reason for refusal by this court to review the question.

In the Spotts case (102 F. [2d] 160) cited and relied on by respondents, the defendant carrier there proved and seems to have relied upon the fact that the type of brake involved in that case was used by the Railroad Administration during the previous World War and that at the close of the Railroad Administration 500 cars so equipped were

delivered to defendant, and defendant insisted that the order of the Interstate Commerce Commission of March 13, 1911, specifying that cars should be equipped with "hand brakes of an efficient design," was an approval of the hand brake in use on the car involved in that case.

The Court of Appeals at page 163 of 102 F. (2d) says: "The order of the Interstate Commerce Commission is merely a direction to comply with the statute requiring an 'efficient hand brake'." On the same page the Court says, "Here the Commission has prescribed merely any 'efficient hand brake'; it has included no specific requirements and fixed no standard as filling the demands of 'efficiency'."

It is manifest that the Circuit Court of Appeals in that case was not fully informed as to the scope of the order of the Interstate Commerce Commission or it would never have said that the Commission "has included no specific requirements and fixed no standard as filling the demands of 'efficiency'."

As a matter of fact and as that court ought to have known, for courts take judicial notice of the orders of the Interstate Commerce Commission, the Commission *had* included specific requirements and *had* fixed standards filling the requirements for an efficient hand brake.

Those specific requirements and fixed standards are set forth in 2 Roberts Federal Liabilities of Carriers, Second Edition, pages 2010, 2011 and 2012 and for the convenience of the Court they are here set forth as follows:

SAFETY APPLIANCE STANDARDS
BOX AND OTHER HOUSE CARS

Handbrakes

Number:

Each box or other house car shall be equipped with an efficient handbrake which shall operate in harmony with the power-brake thereon.

The handbrake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions:

The brake-shaft shall be not less than one and one-fourth (1¼) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16) inches in diameter, of malleable iron, wrought iron or steel.

Location:

The handbrake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application:

There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half (½) inch bolts or rivets.

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred.

Brake-shaft shall be arranged with a square fit at its upper end to secure the handbrake wheel; said square fit shall be not less than seven-eighths (⅞) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches.

Brake-chain shall be of not less than three-eighths (⅜), preferably seven-sixteenths ($\frac{7}{16}$), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ($\frac{7}{16}$), preferably one-half (½), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half (½) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut.

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths (¾), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring.

Brake-shaft drum shall be not less than one and one-half (1½) inches in diameter.

Brake ratchet-wheel shall be secured to brake-shaft by a key or square-fit; said square-fit shall be not less than one and five-sixteenths ($1\frac{5}{16}$) inches square. When ratchet-wheel with square-fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl.

Brake rachet-wheel shall be not less than five and one-fourth (5¼), preferably five and one-half (5½), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth.

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half (½) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five eighths (⅝) of an inch in diameter, or upon a trunnion secured by not less than one-half (½) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths (¾) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square-fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches.

Brake-Step.

If brake-step is used it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application:

Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths (⅜) by one and one-half (1½) inches or equivalent, which shall be securely fastened to body of car with not less than one-half (½) inch bolts or rivets.

We repeat what has already been said, that there is not a word of evidence in the entire record that the hand brake failed in any particular to comply with these requirements of the Interstate Commerce Commission. We believe the Court in this case should say as it said in the Scarlett case, that when the carrier has complied with the requirements of the Interstate Commerce Commission, then neither plaintiff nor Court nor jury can be allowed to say that the hand brake was defective or not efficient or that the defendants did not perform their duty under the Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission. That certainly should be the ruling when plaintiff, as in this case, having on rubbers and chamois skin gloves fell from the wet brake platform on a rainy, sleety night, and when each time he turned the brake wheel he heard the dog or pawl click in the ratchet wheel, which showed that the dog was holding the brake, and when he stated that he did not know of any defect in the hand brake, that when he let loose or started to let loose of it, it suddenly spun and reversed and he could not let go of it.

In Illinois Central R. Co. v. Williams, 242 U. S. 462, the plaintiff recovered judgment for injuries received "when the handhold or grab iron placed at the top of the ladder, and required to be fastened securely to the roof of the car, gave way, causing him to fall to the ground and sustain injuries."

On page 464 the Court says:

> "A box car could not properly be used without a secure ladder, and since, by its terms, all cars having ladders must be equipped with secure handholds, the

> application of this section * * * to the case at bar, the neglect of its requirements, and the liability of the defendants to the plaintiff for the result to him of such **neglect**, are too clear for discussion." (Emphasis ours.)

The Court then states the provision of the Act requiring the Interstate Commerce Commission to "designate the number, dimensions, location and manner of application of the appliances," and says (page 465) that "**a failure to conform its equipment to such standards** shall subject the **neglecting** carrier to like penalty as failure to comply with any requirement of the act." (Emphasis ours.)

The Court also says:

> "Pursuant to the command of this 3rd section, the Interstate Commerce Commission on March 13, 1911, issued an order designating 'the number, dimensions, sizes and manner of application of the appliances provided for by section 2 of the act' (which included hand brakes), and specifically describing the size, character, and location of ladders on 'freight-train cars' and of handholds to be maintained at the tops of such ladders, and of hand brakes also."

And yet, notwithstanding what this Court said in that case, the Circuit Court of Appeals in the Spotts case say that the Interstate Commerce Commission has not made such designation and has not fixed any standard.

In Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U. S. 471, the plaintiff sued for damages for an alleged violation of the Federal Safety Appliance Act (Act of April 14, 1910, c. 160, Sections 2 and 3, 36 Stat. 298), which is the same act under which the respondent in this action sued.

The Court, at page 472, said:

> "The ladder itself was not defective. In its structure it complied with the regulations of the Interstate Commerce Commission made in pursuance of the act, 'United States Safety-Appliance Standards'—order of March 13, 1911. It is unnecessary to set forth these regulations. The only one important here prescribes—'Minimum clearance of treads, (shall be) two (2), preferably two and one-half (2½) inches'."

The Court, at page 474, says:

> "In the light of the long-continued use of brace rods of the type here in question in the same relation to the ladder as in the case here, we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare Pennell v. Philadelphia & Reading Ry., 231 U. S. 675, 680. The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railroad company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission."

In Chicago Great Western R. Co. v. Rambo, 298 U. S. 99, the plaintiff sued to recover damages for death alleged to have been the result of a violation of the Federal Boiler Inspection Act. This court on writ of certiorari reviewed the judgment of the Supreme Court of Minnesota. The Court, at page 100, says:

> "Several acts of negligence were alleged, but the

trial court submitted only one to the jury: Failure to equip the locomotive with a headlight of the illuminating power required by Federal law."

On page 101 the Court says:

"In cases like this, we must examine the record and determine for ourselves whether as a matter of law there is enough evidence to sustain a finding of **negligence** (citing cases)." (Emphasis ours.)

On page 102 the Court stated the evidence as contained in the opinion of the state court and says:

"This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture (citing cases)."

The evidence of the engineer of the locomotive and of another witness tended to show that the headlight was not sufficient to properly illuminate the track 800 feet ahead. The Boiler Inspection Act authorized the Interstate Commerce Commission to prescribe rules and regulations fixing the standards necessary to constitute compliance with this Safety Appliance Act and the Commission by its Rule 129 prescribed the standard (298 U. S. loc. cit. 100).

The Court, at page 105, says:

"Nothing in all this gives substantial support to the notion that the headlight failed to illuminate the track 800 feet ahead, or was below the **required standard."**

The respondent is entirely mistaken when he says (page 17, Respondent's Brief), "The petitioners here do not contend, and cannot contend, that there was no proof of the inefficiency of the hand brake here involved."

It is surprising that counsel for respondent would make that statement, for the petitioners in paragraph 3 of Reasons Relied on for Allowance of the Writ (page 12), say, "3. The state court erred in holding that the plaintiff was entitled to recover * * * for the reason that there was no evidence that the hand brake equipment failed in any particular to comply with the rules, orders or regulations of the Interstate Commerce Commission * * *." The same contention is made by the petitioners in their brief at page 33.

It is a well established rule of construction of statutes that the intention of Congress is to be determined by a consideration of all the parts and provisions of an act, and the Act of April 14, 1910, should be construed in accordance with that rule, while Section 2 of that act (section 11, Title 45, U. S. Code) says, "All cars must be equipped with * * * efficient hand brakes," section 3 of the act (section 12, Title 45, U. S. Code) says:

> "The number, dimensions, location and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter * * *."

The plaintiff's petition charged that defendants (petitioners) were liable on the ground that they had failed to comply with the requirements of the statute and "the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated

pursuant thereto, in such cases made and provided to have said box car equipped with an efficient hand brake."

Of course this becomes unimportant and is answered if the contention of the petitioners be correct that they are entitled to the immunity claimed under the Federal Employers' Liability Act and the Safety Appliance Act of April 14, 1910, in that the petition does not state a cause of action against them as a railroad carrier because it does not allege that plaintiff was injured "by reason of any **defect or insufficiency, due to its** (petitioners') **negligence, in its cars,**" and does not base the right to a judgment against petitioners on the ground that they were **using** a car "not equipped as provided in this chapter" (Appendix to petition and brief, pp. 47 and 48), which is the only offense made punishable or penalized by the statute, but only charges that plaintiff's injury "directly and proximately resulted from defendants' **failure to perform their duty * * * to have said box car equipped** with an efficient hand brake" (R. 3).

The record in this case shows not only that the respondent failed to prove that the hand brake did not conform to the standards fixed by the Interstate Commerce Commission and that his injuries "directly and proximately resulted from defendants' failure to perform their duty under * * * the orders, rules and regulations of the Interstate Commerce Commission," as he alleged twice in his petition (R. 3), but that the hand brake was not defective and did comply with the standards fixed by the Commission, under the authority and command of the Act of April 14, 1910, and for this reason the judgment of the state court should be reviewed by this Court in the exercise of its sound judicial discretion.

IV.

The respondent is mistaken in his contention that, although he bases his case and his right to recover upon the Federal Employers' Liability Act, as he had to do in order to maintain a suit in the courts, he can evade and ask the Court to ignore the provision of that act which make the carrier liable and give respondent a right to recover in this case only by pleading, proof and finding by the jury that his injury when he fell from the car was caused by some "defect or insuffiency, **due to its** (petitioners') **negligence, in its cars.**"

This Court has in numerous cases held that proof of negligence and a defect in the equipment are essential in a suit based upon the Federal Employers' Liability Act, as this case is necessarily based.

In Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, the Court reversed the judgment of the Supreme Court of North Carolina which affirmed a judgment in favor of the plaintiff in an action brought under the Federal Employer's Liability Act. The Court quoted the provisions of the Act giving a right of action for injury received by an employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, work, boats, wharves, or other equipment."

The Court at page 501, after quoting this provision of the Act said:

> "This clause has two branches; the one covering the negligence of any of the officers, agents, or em-

ployees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. (Citing cases.) To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence'. The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendants' negligence. In this there was error."

The Court then considered the provisions of the Federal Employer's Liability Act providing that the employer

could not defend on the ground of assumption of risk or contributory negligence of the employee "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The decision of this Court in the Horton case was rendered on April 27, 1914, more than four years after the enactment of the Safety Appliance Act of April 14, 1910, relating to hand brakes and ladders on cars. The Court had before it in this decision the Act of April 14, 1910, chap. 103, 36 Stat. at L. 913, for on page 503 the Court, after quoting the provisions pertaining to assumption of risk and contributory negligence, says:

> "By the phrase 'any statute enacted for the safety of employees,' Congress evidenctly intended Federal statutes, such as the safety appliance acts (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 911, p. 1314; 36 Stat. at L. 298, chap. 160, U. S. Comp. Stat. Supp. 911, p. 1327; id. 913, chap. 103, U. S. Comp. Stat. Supp. 911, p. 1333), and the hours of service act (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.
>
> "It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated,

quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of rick—perhaps none was deemed feasible."

The Safety Appliance Act of April 14, 1910, upon which the respondent in the case at bar bases his action, is enumerated in the above quotation as "id. 913, chap. 103," that is 36 Statutes at Large, page 913, chapter 103. The decision of this Court in Seaboard Air Line Railroad Co. v. Horton, has never been overruled and has been cited as authority in many cases, as recently as twice in 305 U. S. at page 2 and page 3. It is the law of the land which controls and should be applied in the case at bar.

The Federal Locomotive Boiler Inspection Act (Act of February 17, 1911, Chap. 103, 36 Stat. at L. 913, 45 U. S. Code sections 22 to 34) is a Safety Appliance Act as this court stated in Great Northern Railway Co. v. Leonidas, 305 U. S. 1, 2.

The Horton case is cited by the Court in Southern Ry. Co. v. Gray, 241 U. S. 333, a suit under the Federal Employers' Liability Act, and the Court, at page 339, says, **"Negligence by the railway company is essential to a recovery * * *."**

Since the ruling of this court in seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, in 1914, the Congress has been in session many times and for many years, but it has not made any change in the provisions of the Federal Employers' Liability Act or the Safety Appliance Act of April 14, 1910, as those acts were interpreted by this court in that case. This "amounts to a confirmation" of the judicial interpretation placed upon the acts by this court in that case. McFeely v. Commissioner of Internal Revenue, 296 U. S. 102, 108.

In Jacobs v. Southern Ry. Co., 241 U. S. 229, the Court, at page 235, in considering the Federal Employers' Liability Act in a suit by a fireman injured in attempting to get on an engine, says, "It is clear, therefore, that the assumption of risk as a defense is abolished only *where the negligence of the carrier is in violation of some statute enacted for the safety of employees.* In other cases, therefore, it is retained. And such is the ruling in the Horton case (Seaboard Air Line R. Co. v. Horton, 233 U. S. 492), *made upon due consideration and analysis of the statute* and those to which it referred." (Emphasis added.)

In Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, the Court at page 509 quotes the provision of the Federal Employers' Liability Act imposing a liability for injury to an employee "resulting in whole or in part * * * by reason of any defect or insufficiency *due to its negligence in its cars* * * *." The Court at page 510 says, "As was held in San Antonio & A. Pass. R. Co. v. Wagner, 241 U. S. 476, a violation of the safety appliance act is '*negligence*' within the meaning of the liability act."

In St. Louis-San Francisco Railway Co. v. Mills, 271 U. S. 344, the plaintiff, respondent, sued to recover under the Federal Employers' Liability Act. The Court at page

347 says: "The burden of proving negligence rested upon the respondent."

At page 348, the Court says: "The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

In Atlantic Coast Line Rd. Co. v. Burnette, 230 U. S. 199, the plaintiff commenced suit on January 7, 1910, for injuries received while employed by the defendant railroad in interstate commerce on October 5, 1907, the Supreme Court of North Carolina held that the railroad company could not rely on the limitation of two years in the Federal Employers Liability Act because of "want of a plea setting it up."

This Court reversed the judgment of the State Supreme Court and at page 200 said:

> "It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time (citing case); but when a party has meant to insist on all the right it might have, such a result would be unusual and extreme."

The Court, at page 201, also said:

> "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure (citing case). But, irrespective of the fact that the act of Congress is paramount, when

> a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther (citing cases). There may be especial reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited (citing cases). At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source (citing cases). If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a state as in those of the United States."

The Court of Appeals in the Spotts case (102 F. [2d] 160) cites Philadelphia & R. R. Co. v. Auchenbach, 16 F. (2d) 550, in support of the point on which the Spotts case was decided and on which respondent in the case at bar relies, namely, "The test in fact is the performance of the appliance." In the Auchenbach case the plaintiff alleged and the case was submitted on the charge that the railroad company was **negligent** in violating the Safety Appliance Act relating to **automatic couplers.** The Circuit Court of Appeals (16 F. [2d], page 552) said:

> "The defendant's **negligence,** if any, consisted in violating a duty imposed by statute. The statute made it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, **couplers that will couple automatically by impact.** That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition 'at all times' (citing case). The test of the observance of this duty is the performance of the appliances." (Emphasis ours.)

The Court of Appeals then, in quotations, says:

> "The failure of a **coupler** to work at any time sustains a charge that the Act has been violated."

The Court (page 552) then cites five cases decided by this Court to support its conclusions, none of which involved the use of hand brakes.

In St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, the Court said:

> "The right to recover for the death was based solely on the failure to equip the two cars which were to be coupled with such drawbars as were required by the act of Congress known as the safety appliance law. 27 Stat. at L. 531, Chap. 196."

That law was the automatic coupler law, passed March 2, 1893, which required that cars be "equipped with **couplers coupling automatically by impact**, and which can be **uncoupled without the necessity of men going between the ends of the cars.**"

The case of Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, was a suit for penalty under the Act of March 2, 1893, and the Act of March 2, 1903, for using cars not equipped with **air** brakes. This Court quoted with approval the ruling of the trial court that the carrier was liable, "provided the accident occurs from a **defective appliance** such as is described in this act."

This court also quoted from the opinion of the Circuit Court of Appeals as follows:

> "The cause is simplified by the concession of counsel for the railway company that there was

evidence tending to prove the **defective condition** of each of the four cars."

The Court of Appeals cited the Taylor case (210 U. S. 281) on the point that under the statute there in question the duty was an absolute one "and not one which is discharged by the exercise of reasonable care or diligence." That statute is the same one, which requires automatic couplers, and the Court bases its decision on the provisions of that Act. (Act of March 2, 1893.) The Court (220 U. S. l. c. 571-575) cites, quotes and follows the Taylor case.

In San Antonio & Arkansas R. Co. v. Wagner, 241 U. S. 476, plaintiff sued for injuries received in **coupling cars**, charging that the "couplers would not couple automatically by impact, as required by law," the Act of March 2, 1893, as amended by the Act of March 2, 1903.

In Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, the suit was for injuries received under the automatic coupler law.

In Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, the suit was under the automatic coupler law and the petition alleged *negligence* of defendant. The jury, *under an instruction of the Court, was permitted to infer negligence* on the part of the company from the fact that the coupler failed to perform its function, there being *no other proof of negligence*." Citing the Taylor case.

This Court in Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, an action for damages under the Federal Employers' Liability Act, said:

"At the close of all the evidence, petitioner moved the Court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture."

"Judgment for respondent was given by the trial court, and, on appeal, it was affirmed in the highest court of the state, 160 Minn. 411, 200 N. W. 477. The case is here on writ of certiorari. Judicial Code, sec. 237."

"Petitioner contends that the evidence is not sufficient to sustain a finding that any negligence on its part cause or contributed to cause the death."

On page 474, the Court says:

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superceded. (Citing cases.) The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This Court will examine the record, and if it is found as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed." (Citing cases.)

In Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U. S. 471, which cited and relied on by the Court in the Spotts case (102 F. [2d] l. c. 163) says "Plaintiff relies

on," the plaintiff "alleged that the injury was due to the negligence of the railway company." At the trial plaintiff abandoned his claim based upon negligence in having a brace rod on the side of a car adjacent to the side ladder, and "put his case wholly on the ground that the round diagonal brace rod and the ladder combined to constitute an unsafe appliance within the meaning of the act, and that, in consequence, the liability of the railway company was absolute." This court held that there was no violation of the act relating to hand holds and side ladders.

That the decision in the Spotts case is based upon decisions in cases under the automatic coupler law is shown not only by the fact that the cases which that court cited and relied upon arose under the coupler law, but the Court clearly shows that it was following the ruling in automatic coupler cases for at page 162 of 102 (2d), it says:

> "Proof of an actual break or visible defect **in a coupling** appliance is not a prerequisite to a finding that the statute has been violated." (Emphasis added.)

The case of St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, cited as an authority for the decision in the Spotts case, and the basis for the rulings in the state and lower federal court cases cited and relied upon by respondent, was argued and submitted on April 14, 1908, two years before the hand brake law was enacted on April 14, 1910, and was for injuries alleged to have resulted from a failure to have a car equipped with a proper draw bar, a violation of the automatic coupler act.

The respondent apparently would have the Court believe that the petitioners (defendants) adopted and accepted the theory of the respondent (plaintiff) that he was

entitled to recover even though the brake was not defective. (Respondent's Brief in Opposition, pp. 6, 7.)

The record presented with the petition for the writ (pp. 8, 9) shows that the petitioners (defendants) at the very commencement of the trial on the voir dire examination of the jury, contended that they were not liable if the jury did not find the injury was caused by a defect in the brake. The respondent (plaintiff) objected to that statement and contended he was not required to prove any defect, but simply that the brake "didn't operate" (R. 8, 9). The trial court sustained the plaintiff's objection and contention and the defendants had no alternative but to conform their defense to the rulings of the Court. The respondent in his brief inadvertently overlooked this important incident and ruling at the trial.

The position and contention of the respondent (plaintiff) and the theory of the lower court on which the case was tried is shown by the opening statement of counsel for plaintiff (R. 14) where counsel said: "We don't attempt to show and there will be no attempt to show in this case that the company is guilty of negligence."

The plaintiff's petition (R. 2, 3, 4) did not charge that there was any negligence on the part of the defendants (petitioners) and they objected at the outset to the introduction of any evidence for the reason that the petition "fails to state facts sufficient to constitute a cause of action." (R. 22.) The Court overruled the objection and the defendants excepted. (R. 22.)

At the close of plaintiff's evidence (R. 112, 113) the defendants requested the Court to instruct the jury that

under the pleadings and the evidence the plaintiff was not entitled to recover. The Court refused to give this instruction and the defendants excepted. (R. 113.)

At the close of all the evidence (R. 310, 311) the defendants (petitioners) again requested the Court to instruct the jury that under the pleadings and the evidence the plaintiff was not entitled to recover, which instruction the Court refused to give and the defendants saved their exceptions. (R. 311.)

The rule is so well established as not to require citation of cases that when a court has ruled adversely to the contention of one of the parties, he does not waive his objection or adopt the adversary's theory by making the best defense he can under the adverse ruling of the Court or by submitting the converse of the theory upon which the other party submits his case.

V.

The respondent contends that the decision of the state court is not in conflict with the latest decision of a Federal court on the proper interpretation and application of the Safety Appliance Act of April 14, 1910, and bases this contention on two grounds. One is that the decision in Grand Trunk Western R. Co. v. Holstein, 6 Cir., 67 F. (2d) 780, is based upon a discrepancy between a statement made by the injured employee and his testimony at the trial. The other ground is that the Holstein case is not the latest decision on that question for the reason that the Seventh Circuit Court of Appeals in the more recent case of Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, has decided the question in a way

different from the decision of the Sixth Circuit Court of Appeals in the Holstein case, 67 F. (2d) 780.

The respondent seeks to distinguish and discount the decision in Grand Trunk R. Co. v. Holstein, 67 F. (2d) 780, by saying that the decision is based upon and justified by a discrepancy between a statement made by the employee Holstein soon after his injury and his testimony on the trial.

The record in this case (R. 102, 103, 104) shows that the respondent in this case made a statement soon after his injury which is as much at variance with the evidence as to the admitted physical facts as was the situation in the Holstein case, and if the decision in that case reversing the judgment is based upon that variation, as the respondent here contends it was and ought to have been, then it would seem that the judgment in this case ought to be reversed. In the statement of respondent made March 3, 1938, within two weeks after the injury, he said (R. 103, 104):

> "Either the ratchet came above the dog (pawl) or the dog (pawl) came above the ratchet, at least it did not hold."

With the testimony of the plaintiff describing the hand brake equipment as he did at the trial (R. 27, 28, 29, 85, 86), and the statement in respondent's brief (page 3), that the photograph of the car taken the morning after the injury and offered in evidence as Defendants' Exhibit 10 (R. 125) clearly illustrates the hand brake and the description in the brief of the brake equipment, it seems quite apparent that there was as great variation between plaintiff's statement and his testimony in this case as

there was in the Holstein case. We wish to say, however, that we do not concede that the decision in that case was based upon such variation. The decision was clearly based upon a failure to prove that the brake was defective.

The difference between this case and the case of Spotts v. Baltimore & Ohio, 102 F. (2d) 160, on which the respondent relies, is vital in several particulars. In that case, as the Court says, the complaint charged that "defendant **negligently** failed to equip properly a certain car with an efficient brake wheel and brake staff, contrary to the provisions of the Safety Appliance Act, **negligently** provided a brake staff and wheel which fell to one side, when plaintiff attempted same, and permitted the brake to be and remain in a **defective and unsafe condition** contrary to the provisions of the Safety Appliance Act."

In this case respondent contended and the state court ruled that plaintiff was not required to allege or prove that defendants were negligent or that the brake was defective.

In that case, the plaintiff did not allege a right to recover under the Federal Employers' Liability Act. In this case the plaintiff expressly based his right to recover under the provisions of the Federal Employers' Liability Act (R. 3), and he could not maintain an action in the courts of Missouri without basing his right to recover upon the Federal Employers' Liability Act.

The opinion in the Spotts case shows that the Circuit Court of Appeals based its decision upon the rule applied in cases arising under the automatic coupler law, for the Court in that case at page 162 of 102 F. (2d) says:

> "Proof of an actual break or visible defect in a **coupling appliance** is not a prerequisite to a finding that the statute has been violated." (Emphasis ours.)

The decision of that Court in that case is certainly not binding on this Court in considering whether the decision of the state court should be reviewed on writ of certiorari.

The Court of Appeals in the Spotts case cited and followed the case of Didinger v. Pennsylvania R. Co., 39 F. (2d) 798, but overlooked the later case of Grand Trunk W. R. Co. v. Holstein, 67 F. (2d) 780, which should have been followed in the Spotts case because it was the latest decision of any Federal court.

Even a casual reading of the opinion in the Spotts case shows that it wholly fails to distinguish between the Automatic Coupler Act of March 2, 1893, which requires that cars be equipped with couplers coupling automatically by impact and operate mechanically and without the aid or use of manual energy, and was enacted for the express purpose of preventing human effort and intervention, and the hand brake law of April 14, 1910, which requires that cars be equipped with hand brakes, which can **only** be operated and made effective by manual effort applied by men, who vary in energy, strength, alertness and intelligence, no two of whom possess in equal degree these personal qualities and qualifications. It was because of the knowledge which Congress had of the variation in these qualities and qualifications which different men possess, and the knowledge that the efficient operation of hand brakes depended upon the possession and exercise of these qualities and qualifications by the vast num-

ber of individuals employed as switchmen and brakemen on the hundreds of railroads in this country, that caused Congress to express in the hand brake law, **as it did not express in the automatic coupler law,** the intention that the hand brake law should only apply where and when the equipment was defective. This understanding and intention is expressed in five places in one section and once in another section of the act, whereas the automatic coupler law dealing only with mechanical equipment not requiring the intervention of human agency and energy to make it effective, makes no mention of or reference to defective or out of repair condition of the lifeless materials which constitute automatic couplers and can cause them to couple automatically by impact wholly without the use of human energy, strength, alertness and intelligence, the essential human elements necessary in the efficient operation of hand brakes.

In considering whether the Court ought to review the record and consider the case on its merits in order to determine whether the judgment of the State Court should stand, it seems pertinent and important to call attention to some of the facts which shed a very definite light on the question whether plaintiff proved that **the brake** was either defective or inefficient.

The accident was at night. It was raining and sleeting (R. 27, 87, 104). The brake platform and the brake appliances were wet. Plaintiff had rubbers on his feet and chamois skin gloves or mittens on his hands. He was tightening the brake on the car by turning the brake wheel from left to right. He had tightened the brake until he had taken the slack out of the brake chain and had tension of the brake shoes against the car wheels. He was making an effort to check the movement of the

car by applying his strength to the brake wheel to overcome the momentum of the car moving down grade to the south and the force of the locomotive and twelve cars it was pushing against the L. & N. car 12670. To apply his strength to the brake wheel to turn it from left to right or clockwise, he naturally had to brace himself to his left and against his left foot.

We trust and believe that we do not reflect upon the decisions of the courts, we certainly do not intend to, when we say that we believe the courts in their decisions have entirely overlooked the difference between the provisions of the Automatic Coupler Law and the provisions of the Hand Brake Law and have wholly overlooked the reason and purpose Congress had in making a difference in the provisions of these two laws, and the reasons why the courts should make a distinction in the interpretation and application of the two laws.

The petitioners fully realize that in passing upon and granting a petition for a writ of certiorari, the Court is not determining the questions which are made the grounds for the petition, and they do not mean to present this question now to the Court as for a final determination, but they do believe that this question is such as to fully warrant the Court in exercising its power of review in order that these clear distinctions in the two laws and the clear reason for the distinction may be considered and determined by the Court, as we believe has never yet been done, and as respondent's counsel conceded when at page 15 of their brief they say:

> "We frankly concede our inability to find any decision of this court which passes directly upon this aspect of the provisions of the act and of the order of the Commission relating to 'efficient hand brakes'."

Although the petitioners here seek a review of the decision of a state court, and not a review of a decision of a Circuit Court of Appeals in conflict with the decision of another Circuit Court of Appeals, yet as respondent contends that the decision of the state court is in harmony with the decision of the Seventh Circuit Court of Appeals in Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, and that that case is in conflict with the decision of the Sixth Circuit Court of Appeals in Grand Trunk R. Co. v. Holstein, 67 F. (2d) 780, it would seem that the Court in the exercise of sound judicial discretion might very properly grant the petition and review the decision of the state court in order that the important federal questions involved in that decision and in the conflicting decisions of the circuit courts of appeals of the Sixth Circuit and the Seventh Circuit may be definitely and finally settled by the decision of this Court in this case. This is an important question of federal law which has not been, but should be, settled by this court and it would seem to call for the exercise of this Court's power of supervision within the meaning of the Rules relating to review on writs of certiorari.

Respectfully submitted,

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